



ATTORNEY GENERAL OF TEXAS  
G R E G A B B O T T

March 9, 2005

Ms. Julie Joe  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2005-02015

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 219796.

The Travis County Sheriff's Office (the "sheriff's office") received a request for information related to three specified incident reports. You state you do not have some of the requested information.<sup>1</sup> You also state that you are releasing some of the requested information to the requestor. You claim that the remaining submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes documents that appear to have been produced in response to grand jury subpoenas. This office has concluded that grand juries are not governmental bodies subject to chapter 552 of the Government Code, so records within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that any of the submitted documents held by the sheriff's office are in the constructive possession of the grand jury, they are not subject to the Act.

We next discuss your acknowledgment of your noncompliance with section 552.301 of the Government Code. *See* Gov't Code § 552.301(d) (requiring governmental body to provide requestor with copy of written communication to the attorney general requesting an attorney general decision within ten business days after receipt of request for information). According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. A governmental body must release information presumed public under section 552.302, unless it demonstrates a compelling reason to withhold the information. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists when some other source of law makes the information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because you claim section 552.108 of the Government Code on behalf of another governmental body, which can provide a compelling reason for nondisclosure, we will consider your arguments under this exception. *See* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under Gov't Code § 552.108). Also, we will address the applicability of section 552.101 of the Government Code in conjunction with common law privacy.

Next, we note that the submitted documents include a probable cause affidavit for an arrest warrant. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. It is unclear, however, whether the submitted probable cause affidavit was presented to a magistrate in support of the issuance of an arrest warrant. As we are unable to make this determination, we must rule in the alternative. If the submitted probable cause affidavit was so presented, it must be released to the requestor pursuant to article 15.26 of the Code of Criminal Procedure. If it was not so presented, then it must be disposed of in accordance with this ruling.

The submitted documents also contain a search warrant that was filed with the court. Information contained in a public court record is generally available to the public. *See* Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). We have marked the search warrant that must be released.

An affidavit for a search warrant is made public under article 18.01 of the Code of Criminal Procedure where the related search warrant was executed. *See* Crim. Proc. Code art. 18.01(b). In this instance, the related search warrant was executed. Therefore, the submitted search warrant affidavit must be released.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The submitted documents contain information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. In most cases, the sheriff's office would be allowed to withhold only this information. In this instance, however, the requestor knows the identity of the individual involved as well as the information in question. Therefore, withholding only certain details of the incident from the requestor would not preserve the named individual's common law right of privacy. Accordingly, to protect the privacy of the individual to whom the information relates, we determine that the sheriff's office must withhold incident report number 04-26940 in its entirety under section 552.101.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In Open Records Decision No. 586 (1991), we concluded that the need of a governmental body, other than the one that has failed to timely comply with the requirements for requesting an attorney general decision under the Act, to withhold information from disclosure may be a compelling reason to overcome the presumption that the information is public. You inform us that the Travis County District Attorney's Office ( the "district attorney's office") objects to the release of incident report number 04-35151 because it pertains to pending prosecutions. Thus, the sheriff's office may withhold incident report number 04-35151 under section 552.108 on behalf of the district attorney's office.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to

the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information, you may withhold incident report number 04-35151 from disclosure based on section 552.108(a)(1).

In summary, to the extent that any of the submitted documents held by the sheriff's office are in the constructive possession of the grand jury, they are not subject to the Act. The submitted probable cause affidavit for an arrest warrant must be released under article 15.26 of the Code of Criminal Procedure if it was presented to the magistrate in support of the issuance of an arrest warrant. The submitted executed search warrant and search warrant affidavit must be released under section 552.022(a)(17) of the Government Code and article 18.01(b) of the Code of Criminal Procedure, respectively. The sheriff's office must withhold incident report number 04-26940 in its entirety under section 552.101 of the Government Code and common law privacy. With the exception of basic information that must be released, the sheriff's office may withhold incident report number 04-35151 on behalf of the district attorney's office under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

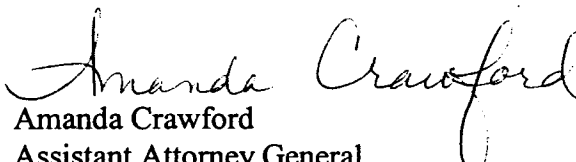
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

  
Amanda Crawford  
Assistant Attorney General  
Open Records Division

AEC/sdk

Ref: ID# 219796

Enc. Submitted documents

c: Mr. James Wardlaw  
10607 West Lakeview Drive  
Jonestown, Texas 78645-3422  
(w/o enclosures)